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Nos. 98-1716, 98-1718

In The

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,

Petitioners,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

LOUIS RHODES,

Petitioner,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arizona

STATEMENT OF RESPONDENTS LISA GRAHAM KEEGAN, *ET AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUE PRESENTED

Does the Arizona School Tuition Organization Tax Credit Program, which provides state income tax credits for voluntary contributions to charitable scholarship organizations, and adds private schools to an existing array of public school choices, violate the First Amendment's establishment clause?

PARTIES REPRESENTED

The parties represented herein were intervenors/respondents in the action below: Lisa Graham Keegan, in her official capacity as Superintendent of Public Instruction and as a parent and taxpayer; Emmett McCoy, Sr. and Alfreda McCoy, in their own behalves and as natural guardians of their children, Dallas McCoy, Krystal McCoy, Sean McCoy, Brandi McCoy, Daniel McCoy, and Priscilla McCoy; Tanya Phelps, in her own behalf and as natural guardian of her children, Tasha Phelps and Leanessa Phelps; Rita Samaniego, in her own behalf and as natural guardian of her children, Geraldo Wingate, Kristin Wingate, and Sarah Wingate; Felipe Sandoval, in his own behalf and as natural guardian of his children, Felicia Sandoval and Felipe Sandoval; Sally Shanahan, in her own behalf and as natural guardian of her children, Nathan Shanahan, Kaitlyn Shanahan, Gabriel Shanahan, and Jacob Shanahan; and Jeffry Flake and Trent Franks, as taxpayers.[1]

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[1] The Petition for Writ of Certiorari filed by petitioner Penny Kotterman, *et al.*, in No. 98-1716, incorrectly identifies Louis Rhodes as a respondent (Pet. ii). Petitioner Rhodes has filed a Petition for Writ of Certiorari in No. 98-1718.

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INTRODUCTORY STATEMENT

Believing that the Arizona School Tuition Organization Tax Credit Program, A.R.S. § 43-1089, represents sound and vitally important public policy, and that greater choice of elementary and secondary schools is necessary to fulfill our nation's guarantee of equal educational opportunities, respondents support the petitions for writ of certiorari in order to remove any lingering question about the constitutionality of parental school choice.[2]

Unfortunately, petitioners misapprehend the nature of a petition for certiorari and instead present a brief on the merits. Rather than re-arguing the case, respondents detail below the reasons why the petitions should be granted. Specifically, a clear and direct conflict has emerged between the Arizona and Wisconsin Supreme Courts and the Maine Supreme Court over the constitutionality of parental school choice under the First Amendment. This conflict emerges at a time of urgent need and growing determination to provide high-quality educational opportunities, particularly to economically disadvantaged and inner-city children. Increasingly, states are turning to parental choice as one means of expanding educational alternatives for children who desperately need them while creating a competitive incentive for

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[2] Although two petitions for writ of certiorari were filed, the arguments are largely redundant. All references to the petition herein are to the Petition for Writ of Certiorari filed by Penny Kotterman, *et al.*, in No. 98-1716, unless otherwise denoted.

improvement in public schools. The constitutional uncertainty surrounding parental choice has led to constant litigation and conflicting outcomes, all to the detriment of our nation's most vulnerable schoolchildren. The Arizona case provides an excellent opportunity for this Court to apply to parental choice the establishment clause principles it has carefully developed in recent cases.

STATEMENT OF THE CASE

An establishment clause challenge requires the Court to inquire into "the nature and the consequences of the program viewed as a whole." *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring). Unfortunately, petitioners have deliberately distorted the nature and context of the Arizona School Tuition Organization Tax Credit Program in an effort to transmute a constitutional program into an unconstitutional one. That effort begins by creating out of whole cloth a title for the program that appears throughout the Petition, the "Arizona Private School Tax Credit."[3] No such thing exists. The State of Arizona does not provide a tax credit for contributions to private schools, nor for expenses incurred in private schools. Of course, both federal and state law do provide income tax deductions for contributions to certain nonprofit organizations,

[3] A.R.S. § 43-1089 actually denotes the program as a "Credit for Contributions to School Tuition Organization."

including private schools, and exempts many such organizations from taxation. The challenged statute does not affect such deductions or exemptions.

Rather, A.R.S. § 43-1089 provides a credit against state income taxes of up to $500 for contributions to school tuition organizations (STOs). Such organizations must dedicate at least 90 percent of their revenues for scholarships given to children attending qualifying nongovernmental schools, chosen by their parents. The taxpayers claiming the credit may not designate the scholarship for use by their own dependents.

As petitioners acknowledge (Pet. 13-14 & n.4-n.7) and as the Arizona Supreme Court recognized, *Kotterman v. Killian*, 972 P.2d 606, 613 & n.2 (Ariz. 1999) (Pet. App. 10a-11a & n.2), the school tuition organization tax credit is one of many credits and deductions provided to Arizona taxpayers.[4] At the same time as the Arizona Legislature enacted the school tuition organization tax credit, for example, it also enacted A.R.S. § 43-1089.01, which allows a tax credit of up to $200 for fees paid in support of public school extracurricular activities. *See Kotterman v. Killian*, 972 P.2d at 613, 616 (Pet. App. 11a & 17a).

Moreover, the STO tax credit enhances an existing broad array of public school choices. *Id.* at 611 (Pet. App. 6a-7a). Any eligible student may attend any public school in the state without tuition. A.R.S. § 15-816.01(A). The

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[4] In November 1998, Arizona voters acting by popular initiative created an additional state income tax credit of up to $500 for contributions to a fund for political candidates. A.R.S. § 16-954(B).

state also has created innovative charter schools, which may be sponsored by private non-profit or for-profit entities, to "provide additional academic choices for parents and pupils." A.R.S. § 15-181. Under Arizona law, state per-pupil funding follows the child to the school of the parent's choice. A.R.S. § 15-901. The Arizona School Tuition Organization Tax Credit is only one facet of a wide variety of tax benefits and educational options available to the people of Arizona. As respondent Superintendent of Public Instruction Lisa Graham Keegan explains,

> the Educational Tax Credit Law is an important step toward remedying the educational access problem that students, particularly low-income students, currently face in this state. What the Educational Tax Credit Law does is to help children of modest means begin to gain access to the same range of educational opportunities that wealthier children enjoy; and through its public school credit provision, to provide resources to enrich the offerings of public schools.

Exh. A to Resp. of Intervenōrs/Respondents Keegan, *et al.*, to Petition for Special Action, ¶ 11.

The parent respondents put the matter even more tangibly. The McCoys have a large family comprised of 14 natural, adopted, and foster children. Their first four children attended public schools, but the McCoys were not satisfied with their education. Though Baptists, they send all nine of their school-age children to St. Matthew's, a Catholic school. As the McCoys explain,

> We think a child's education is the most important thing for their success in life. We will

> do whatever it takes to give our children the best education that we can. . . .
>
> Although we wanted to keep all of our children in private school, during some unexpected hard times, we had to take them out of the private school because we could not afford the tuition. They are all back in private school now and we intend to keep them there. However, we are afraid that if Alfreda cannot find a job by next year we will have no choice but to send them back to the public school again.

Id., Exh. C, ¶ 15, 17; *see also* Exhs. B, D, E, F, and G. The McCoys have applied for scholarships from respondent Arizona School Choice Trust. *Id.*, Exh. C, ¶ 14. Their circumstances exemplify the high human stakes in this litigation.

REASONS FOR GRANTING THE WRIT

I. A CLEAR AND DIRECT SPLIT OF AUTHORITY EXISTS BETWEEN THE ARIZONA AND WISCONSIN SUPREME COURTS AND THE MAINE SUPREME COURT OVER THE CONSTITUTIONALITY OF PARENTAL SCHOOL CHOICE UNDER THE ESTABLISHMENT CLAUSE.

Parental school choice, encompassing private schools among the range of educational options, presents a classic example of innovative policy experimentation at the state level that is a hallmark of our system of federalism. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Wisconsin and Ohio have enacted programs that allow low-income youngsters in urban school districts to use a share of their public education

funds in private nonsectarian and religious schools. Wis. Stat. § 119.23; Ohio Rev. Code Ann. §§ 3313.974-3313.979. Florida has just passed a statute that allows children in failing public schools to attend other public schools or private schools at state expense. Fla. Stat. ch. 229.0537. In certain communities in Maine and Vermont, no public schools were ever built, and instead students are "tuitioned" to public schools outside their districts or to nonsectarian private schools chosen by their parents. Me. Rev. Stat. Ann. tit. 20-A, § 5204(4); Vt. Stat. Ann. tit. 16, § 822. Some states provide state income tax deductions or partial tax credits for tuition expenses. Iowa Code § 422.12(2); Minn. Stat. § 290.01, subd. 19b(3). Some states allow academically at-risk children to attend private schools, Wis. Stat. § 118.153, or for certain public high school students to take college courses at state expense in private or public postsecondary institutions. Wis. Stat. § 118.55. And, of course, under the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, this Court has determined that where local public education agencies default on their obligation to provide a "free appropriate public education" to a particular student, that child may attend private school at public expense. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985). Arizona is the first state to provide state income tax credits for contributions to private scholarship programs; but the common policy premise in all of these programs is the same: each recognizes that the goals of public education often can be achieved outside of public schools.

This Court has examined analogous programs that include private and religious schools in a variety of contexts. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (sustaining tuition tax deductions); *Witters, supra* (upholding the use of postsecondary public grants for use by a student attending divinity school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing the public provision of an interpreter for a deaf student attending a Catholic high school); *Agostini v. Felton*, 521 U.S. 203 (1997) (sustaining the provision of public remedial teachers in religious schools). The Court summarized the applicable principles in *Agostini, id.* at 231, stating that such efforts do not offend the establishment clause where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

The first two state supreme courts to consider contemporary parental choice programs in the establishment clause context faithfully applied this Court's precedents. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998), the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program against a variety of constitutional challenges, including the establishment clause. Distilling the principles set forth in this Court's jurisprudence, the Wisconsin Supreme Court stated that "state educational assistance programs do not have the primary effect of advancing religion if those programs provide aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a

result of numerous private choices of the individual parents of school-age children." *Id.* at 617. The Court observed that the Milwaukee Parental Choice Program exists against the backdrop of a wide range of publicly supported educational options, the vast majority of them involving public schools. *Id.* at 618 n.16. Accordingly, the Court concluded that the parental choice program does not violate the establishment clause, because it "places on equal footing the options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit."[5] *Id.* at 619.

Likewise, the Arizona Supreme Court below accurately applied this Court's precedents. Finding *Mueller v. Allen* most applicable, the Court found that the tax credit here was only one among many provided by the state for a variety of purposes, *Kotterman v. Killian*, 972 P.2d at 612-13 (Pet. App. 8a-11a);[6] and that funds reach religious

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[5] An Ohio Court of Appeals reached a contrary result with respect to a similar program in Cleveland. *See Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). That decision is on appeal to the Ohio Supreme Court.

[6] Petitioners inventively suggest that the distinction between the scholarship tax credit and other tax credits provided under Arizona law is that the latter are designed to encourage private parties to "engage in socially desirable private actions" (Pet. 13). Contrary to petitioners, we certainly would argue that contributions to scholarship funds are extremely socially desirable. But that disagreement is beside the point because the State of Arizona, acting through its elected representatives, has definitively made that policy decision.

schools only through "multiple layers of private choice."[7] *Id.* at 614 (Pet. App. 13a). In sum, the Court concluded that the tax credit "is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Id.* (Pet. App. 14a) (*citing Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

Up until the Friday preceding the Monday filing of the petitions for writ of certiorari in this case, there was no clear and direct split in authority among state supreme courts on the constitutionality of parental school choice under the establishment clause. But the Maine Supreme Court decision in *Bagley v. Raymond Sch. Dep't*, No. 1999 ME 60, 1999 Me. LEXIS 72 (Me. Apr. 23, 1999), creates such a split, underscoring the necessity of review by this Court.[8] Approximately half of Maine's school districts provide some or all of their public education by "tuitioning" students to public schools in other districts or private schools chosen by parents. Prior to 1981, religious schools were included in the range of choices; but based upon an interpretation of the establishment clause, the Legislature subsequently excluded religious schools from the available options. Families who are eligible for

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[7] Petitioners assert erroneously (Pet. 14) that the scholarship is a "substitute for direct legislative appropriations." Plainly it is not. Unlike an appropriation, not a single dollar flows anywhere unless directed by the voluntary, independent choice of an individual taxpayer.

[8] The Institute for Justice, which represents respondents here, also represents the plaintiffs in *Bagley*. A petition for writ of certiorari in that case will be forthcoming.

tuitioning but who enrolled their children in religious schools challenged the exclusion under the free exercise, establishment, and equal protection clauses of the First and Fourteenth Amendments. The Maine Supreme Court acknowledged that the state was required to justify its discrimination, and that its only justification was compliance with the establishment clause.[9] *Bagley*, 1999 Me. LEXIS 72, at *29. Largely ignoring the most analogous precedent of this Court, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and purporting to apply *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Maine Supreme Court concluded that it would violate the establishment clause to include religious schools among the tuitioning options.[10] The Court

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[9] Issues relating to the inclusion or exclusion of religious schools from generally available educational benefits also have arisen in the contexts of special education, postsecondary education, and supplemental K-12 programs with conflicting results underscoring the confusion in this area. Compare *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998) (holding that the establishment clause requires the exclusion of pervasively sectarian colleges and universities from state higher education grant program) and *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998) (upholding parish school board's provision of special education services to students at private religious schools but striking down as unconstitutional religious school participation in federal Chapter 2 educational and instructional materials program) with *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (holding school district's refusal to provide special education services at a private religious school to be unconstitutional) and *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995) (upholding religious school participation in Chapter 2 program).

[10] *Bagley* also conflicts directly with *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352 (Vt. 1994), allowing the

based its opinion on the grounds that the state's payments are made payable directly to the schools and that secular and religious instruction in the religious schools is not segregated. *Bagley*, 1999 Me. LEXIS 72, at *49-62. The Maine Supreme Court acknowledged that courts in other states had upheld general financial assistance programs including religious schools (citing, among other cases, the decision here), but concluded that "they do not provide persuasive authority for interpretation of the Establishment Clause. The Supreme Court has not yet reviewed any of these programs, and it is not clear which of them, if any, would be found to pass muster under an Establishment Clause analysis." *Id.* at *49.

Respondents believe that in its cases, spanning the last 16 years, this Court has clearly set forth the establishment clause framework within which parental school choice should be analyzed. The Wisconsin and Arizona Supreme Courts have carefully and appropriately applied that framework. Other courts, however, have not.

The present case provides a suitable vehicle to resolve the conflict. Both sides agreed that the case could

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inclusion of religious schools in Vermont's tuitioning program, which is functionally similar to Maine's. A Vermont trial court, however, has refused to extend the *Campbell* decision, which dealt with reimbursement of tuition to parents who had sent their children to religious schools, to the context of prepayment of religious school tuition, holding that such payments would violate the establishment clause. *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. S0478-96 RcC (Vt. Superior Ct., Rutland Cty., June 27, 1997). That case is pending on appeal to the Vermont Supreme Court.

be resolved upon the complete yet concise record presented to the Arizona Supreme Court. The constitutional issues presented by parental choice are transcendent and cleanly presented in this case. Moreover, the juxtaposition of competing principles set forth in the majority and dissenting opinions serves to sharply delineate the issues. The conflict over the constitutionality of parental choice begs resolution by this Court.

II. THE CENTRAL AND CRUCIAL ROLE PARENTAL CHOICE PLAYS IN SYSTEMIC PUBLIC EDUCATION REFORM EFFORTS AROUND THE NATION WILL BE PLAGUED BY LITIGATION UNTIL THIS COURT REMOVES LINGERING CONSTITUTIONAL DOUBT.

Though our nation has made remarkable strides in fulfilling the promise of equal educational opportunities, *see Brown v. Board of Educ.*, 347 U.S. 483 (1954), that progress is painfully uneven. For millions of low-income, predominantly minority schoolchildren, the dream of a quality education too often is illusory. The typical black high school senior scores four academic years behind the typical white senior – a gap that has widened substantially over the past decade. *See* Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 355 (1997). As a whole, America's elementary and secondary school system lags far behind many other industrialized nations. *See* Diane Ravitch, "Our School Problem and Its Solutions," *City Journal*, Winter 1999, at 33-41.

Increased parental choice and competition, both among and outside public schools, is increasingly viewed

as essential to achieving the goals of public education, particularly for low-income, inner-city youngsters. *See, e.g.*, Floyd H. Flake, "School Choice: Why Poor Kids Need It Most of All," 2 *Am. Experiment Q.* 35 (1999); Andrew Young, "Let Parents Choose Their Kids' Schools," *Los Angeles Times*, (April 29, 1999) at B9; Clint Bolick, *Transformation: The Promise and Politics of Empowerment* 34-61 (1998). Although the contours differ, all contemporary parental choice programs, including the one at issue here, share certain common features: (1) funds are placed at the disposal of parents in the form of vouchers, scholarships, tax credits, or tax deductions; (2) private schools are added to the range of public school options; and (3) aid is targeted to economically disadvantaged youngsters. Strong evidence exists that such youngsters often perform better outside of traditional public schools. *See, e.g.*, Paul E. Peterson & Bryan C. Hassel, eds., *Learning from School Choice* (1998); Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Econ.* 98 (1997).

Accordingly, efforts to expand parental choice are proliferating around the nation. Approximately 40 state legislatures this year are considering aid programs, tax credits, or other parental choice measures encompassing private schools among the options. *See* Julie Flaherty, "Maine's High Court Rejects Families' Bid to Use Vouchers for Religious School," *New York Times* (Apr. 28, 1999) at B11.[11] In April, the State of Florida's Legislature

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[11] Specifically, according to petitioner Rhodes, tuition tax credit legislation is pending in at least 14 state legislatures (Rhodes Pet. 22 n.12).

passed the nation's first statewide parental choice program, allowing children in failing public schools to opt out to better public schools or eligible private schools, as part of a broader program of public education reform emphasizing standards and accountability. *See* Linda Kleindienst, "Florida Passes First Statewide Voucher Plan," *Sun-Sentinel (Fort Lauderdale, Fl.)* (May 1, 1999) at 1A. And in May, the Illinois Legislature passed a $500 tax credit for tuition and other educational expenses that will soon be signed into law. *See* Michelle Brutlag & Christi Parsons, "School Tax Credit Soon To Be Law," *Chicago Tribune* (May 13, 1999) at 5. Meanwhile, private philanthropy increasingly is targeted toward expanding educational options for economically disadvantaged youngsters through scholarships. Recently, approximately 1.25 million children nationwide applied for 40,000 scholarships made available by the Children's Scholarship Fund. *See* Joseph A. Califano, Jr., "A Gauge of Distress Within Public Schools," *San Francisco Chronicle* (May 6, 1999) at A27. Obviously, the Arizona School Tuition Organization Tax Credit Program would further foster such private philanthropy.

Litigation against parental choice programs, however, has become as inevitable as death and taxes, as reflected by the lawsuits in Ohio, Wisconsin, and Arizona. Even before Governor Jeb Bush has signed the Florida program into law, anti-parental choice groups have vowed a court challenge. *See* Mike Clary, "Florida To Be First To Launch Statewide School Vouchers," *Los Angeles Times* (April 29, 1999) at A1.

The omnipresent litigation casts a pall upon efforts to expand educational choices for children who desperately

need them. Given the dire crisis facing many of this nation's public schools, now is the time for this Court to remove the constitutional uncertainty surrounding school choice.

CONCLUSION

We urge this honorable Court to grant the petitions in this case and to resolve the constitutional question in favor of parental choice.

Respectfully submitted,

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